STATE OF WISCONSIN
SUPREME COURT

Case No. 99-3297-OA

EMPLOYE TRUST FUNDS BOARD,
THE DEPARTMENT OF EMPLOYE
TRUST FUNDS and ERIC O. STANCHFIELD,
Secretary of the Department of
Employe Trust Funds,

Petitioners,

v.

GEORGE LIGHTBOURN, Acting Secretary
of the Wisconsin Department of
Administration, JACK C. VOIGHT,
Wisconsin State Treasurer,

Respondents,

WISCONSIN EDUCATION ASSOCIATION
COUNCIL, by its President TERRY
CRANEY and its Vice-President,
STAN JOHNSON, and DONALD KRAHN,
MARGARET GUERTLER, GERALD MARTIN,
and PHYLLIS POPE,

Proposed Intervening
Respondents.

PROPOSED INTERVENING RESPONDENTS WEAC ET AL.=S RESPONSE TO PETITIONERS= REQUEST FOR INJUNCTION

INTRODUCTION

Petitioners have requested the Court to enjoin all provisions of 1999 AB495 (AB495) and 1999 AB584 (AB584) while certain elements of AB495 are being challenged in a declaratory ruling.[1] Petitioners have filed a Petition for Original Jurisdiction with the Wisconsin State Supreme Court and seek to have the Court rule on certain constitutional and statutory issues prior to implementation of the provisions set forth in AB495.

WEAC, et al. (WEAC) have filed a Motion to Intervene in the proceeding. WEAC recognizes the filing of this response may be somewhat premature until such time as the Court rules on WEAC=s Motion and allows us to intervene, but given the nature of the case, and the peculiar facts and timing of the proceedings, a preliminary statement of WEAC=s position is required

[1]1999 AB584 was passed as a trailer bill to AB495 to correct certain unintended effects of AB495; as such AB584 has also been implicated in this proceeding.

sooner rather than later. As articulated in greater detail below, WEAC believes that before the Court issues anything more than a temporary restraining order, the parties should be allowed to more fully brief the issues. As outlined below, WEAC questions whether Petitioners have met their burden for injunctive relief. Moreover, several provisions of the legislation have not been challenged by Petitioners and therefore should not be enjoined.

I. WEAC SUPPORTS THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER FOR A LIMITED TIME AND PURPOSE.

WEAC does not object to a temporary restraining order of all provisions contained in AB495 and AB584 for a very limited time and purpose. WEAC agrees that a temporary order is appropriate until such time as the Wisconsin State Supreme Court issues its decision granting or denying the Petition for Original Jurisdiction. If the Court accepts jurisdiction, it should order additional briefing on the necessity and appropriateness of continuing injunctive relief on each specific provision. Nevertheless, under the

circumstances, in order to give the parties time to determine and assess the procedural posture of this matter and to determine the likelihood of obtaining a final and binding decision in a short time period, a temporary restraining order should be issued.

II. PETITIONERS DO NOT MEET THE ESTABLISHED STANDARDS FOR ISSUANCE OF AN INJUNCTION.

After the initial procedural and/or jurisdictional issues are addressed, the parties can fully brief the Court on the application of the legal standards for injunctive relief to each provision contained in AB495. WEAC believes such briefing will demonstrate that an injunction is not warranted for every provision.

The standards for issuing an injunction have been articulated in numerous cases. They have been stated in slightly different ways, but there are three elements: One, the party seeking the injunction must show a reasonable probability of ultimate success on the merits. Shanak v. City of Waupaca, 185 Wis. 2d 568, 588, 518 N.W.2d 310 (Ct. App. 1994); Aken v. Kewaskum Community Schools, 64 Wis. 2d 154, 159, 218 N.W.2d 494 (1974).

Two, the injunction must be necessary to preserve the status quo. Fromm & Sichel, Inc. v. Ray-s Brookfield, Inc., 33 Wis. 2d 98, 103, 146 N.W.2d 447 (1966). Three, the injunction should be granted only if necessary to prevent irreparable harm; the harm is irreparable if the party seeking an injunction has no adequate remedy at law. Wis. Bankers Assn. v. Mutual Savings & Loan Assn. of Wisconsin, 103 Wis. 2d 184, 191, 307 N.W.2d 180 (1981); Harley v. Lindeman, 129 Wis. 514, 109 N.W. 570 (1906).

Even assuming that the party seeking an injunction meets each of the standards set forth above, the granting of an injunction is still discretionary. Pure Milk Products Cooperative v. National Farmers Organization, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 519-20, 259 N.W.2d 310 (1977). A[I]njunctive relief must be tailored to the necessities of the particular case.@ In Re Paternity of CAS & CDS, 185 Wis. 2d 468, 497, 518 N.W.2d 285 (Ct. App. 1994). For the reasons set forth below,

Petitioners have not met these requirements for each and every provision of AB495.

A. Petitioners Do Not Have A Strong Likelihood Of Success On The Merits.

Neither named Respondents nor WEAC concedes that the Petitioners have any likelihood of success on the merits of this proceeding and the Court cannot presume as much. A party challenging a statute must show it to be unconstitutional beyond a reasonable doubt. State v. Carpenter, 197 Wis. 2d 252, 263, 541 N.W.2d 105 (1995). As this Court set forth in State v. McManus, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989), the standards applied in constitutional challenges to legislation are rigorous:

> The constitutionality of a statute is a question of law which this court may review without deference to the lower court. *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 733, 416 N.W.2d 88 (1987). Legislative enactments are presumed constitutional, and this court has stated it Awill sustain a statute against attack if there is any reasonable basis for the exercise of legislative power.@ *State v. Muehlenberg*, 118 Wis. 2d 502, 506-07, 347 N.W.2d 914 (Ct. App. 1984). The party bringing the challenge must show the statute to be unconstitutional beyond a reasonable doubt. *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 187, 290 N.W.2d 276, 283 (1980). AEvery presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment=s constitutionality, it must be resolved in favor of constitutionality.@ *State*

> *ex rel. Hammermill Paper Co. v. LaPlante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). AThe court cannot reweigh the facts found by the legislature. If the court can conceive any facts on which the legislation could reasonably be based, it must hold the legislation constitutional.@ *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 506, 261 N.W.2d 434 (1978).

Petitioners have not met these rigorous standards in a general sense, let alone with respect to each provision contained in AB495.

B. The Various Provisions Contained In AB495 Are Severable And As Such The Injunctive Relief Requested Is Overly Broad And Not Necessary To Prevent Irreparable Harm.

Petitioners seek to prevent implementation of all provisions contained in AB495, including provisions not addressed in the declaratory ruling proceeding, until a final decision is made by the Wisconsin State Supreme Court. WEAC firmly believes that this is unnecessary, excessive and injudicious.

WEAC asserts, contrary to the assertions of named Respondents Lightbourn and Voight, that the various provisions contained in AB495 are separate and severable.

In construing Wisconsin statutes, the law presumes severability. Sec. 990.001(11), Stats. This presumption is reinforced by the specific legislative history relating to AB495. As Petitioners set out in Paragraph 28 of their Petition:

> AB495 was introduced in the Assembly on October 1, 1999. On October 6, 1999, Assembly Amendment 3 was proposed, which provided:
>
> > NONSEVERABILITY. Notwithstanding section 990.001(11) of the statutes, if a court finds that any provision of this act is unconstitutional, the entire act is void.
>
> Assembly Amendment 3 was rejected on October 6, 1999. AB495 was passed in both the Assembly and the Senate on October 6, 1999.

The canons of statutory construction and interpretation, combined with the presumption of severability and the fact that the Legislature considered and rejected the ANonseverability@ clause, dictate a finding that the various provisions of the legislation are severable.

As set forth above, the various provisions contained in AB495 are severable. If a specific provision is not being challenged, or is not likely to

have an impact on the litigation or its possible remedy, then it should be implemented as intended by the Legislature.

III. INJUNCTIVE RELIEF MUST BE TAILORED TO THE NECESSITIES OF THIS CASE.

Petitioners request a broad sweeping injunction affecting all provisions contained in AB495 even those that are not related to the pending proceeding. The law clearly requires, however, that any injunctive relief be Atailored to the necessities of the particular case.@ In Re Paternity of CAS and CDS supra.

A. Certain Provisions of AB495 Are Not Related to The Benefit Improvements Funded by The Transfer From The Transaction Amortization Account And Changes In Actuarial Assumptions Which Are Challenged In The Declaratory Proceeding.

AB495 provides for four billion dollars to be transferred from the Transaction Amortization Account (TAA) to the respective Fixed Annuity Reserves. Additionally, AB495 provides for changes in various actuarial assumptions. Together the A$4 Billion TAA Transfer@ and the AActuarial Assumption Changes@ will fund WRS benefit improvements (increasing the formula

multiplier for creditable service prior to January 1, 2000). These funding mechanisms have been challenged by Petitioners in the declaratory ruling.

WEAC understands the expressed concerns of Petitioners regarding the potential liability if the benefit improvements contained in AB495 and AB584 are implemented and the funding mechanism is subsequently determined to be unlawful. While WEAC believes the Abenefit improvements@ and the Afunding mechanisms@ are separate and severable provisions, it will not pursue that position at this time.

WEAC strongly argues, however, that to the extent particular provisions in AB495 and AB584 are unrelated to the ATransfer from the TAA@ or the AActuarial Assumption Changes,@ they should be implemented as soon as possible in compliance with the effective dates of AB495 and AB584.

Specifically, the following provisions of AB495 (and any relevant portion of AB584) should not be enjoined:

1. Section 12 of AB495 which eliminates the 5% interest cap on employee required contribution accumulations.
2. Section 14 of AB495 which allows certain participants to designate a portion of their future WRS contributions to be segregated in a variable annuity division of the Trust.
3. Section 25 of AB495 which increases the death benefits payable for WRS participants who die before age 55.
4. Section 26 of AB495 which allows death benefits of certain WRS participants to be payable to beneficiaries other than a spouse or dependent.

B. With Respect To Several Provisions Unrelated To The Declaratory Ruling Proceedings, Petitioners Will Not Be Harmed.

Petitioners cannot be harmed by implementing those provisions of AB495 that are not challenged in the declaratory ruling proceeding or that do not have any impact on the litigation or remedy of any issues in that proceeding. Indeed, Petitioners have not made any claim

of harm, irreparable or otherwise, regarding the specific provisions identified above. Since there is no harm to Petitioners there is no legal basis for enjoining those provisions that are unrelated to the litigation.

IV. INDIVIDUAL PARTICIPANTS WILL BE HARMED AND WITHOUT RECOURSE TO ADEQUATE REMEDY IF CERTAIN PROVISIONS ARE ENJOINED.

While it is far from clear that Petitioners will suffer any irreparable harm without an injunction, that is not the case for participants if certain provisions in AB495 are enjoined.

At least four provisions contained in AB495, which are of great value to participants, are unrelated to the pending declaratory ruling proceeding, yet are in danger of being waylaid. Several of these provisions, relating to the variable fund and the death benefits, cannot be adequately remedied retroactively if denied.

For example, if the participants are prevented from allocating a portion of their contributions into the variable fund, they cannot at a later date retroactively invest those contributions in the equities that make up the variable fund. The participants will have forfeited

the opportunity and the earnings that would have resulted therefrom. It simply is not possible to put those participants in the position they would have been in had the variable fund allocations not been blocked.

Similarly, for estate planning purposes, participants need to know with certainty how their death benefits are construed. People literally make Alife or death@ decisions about the form of their retirement benefits, including the death benefits and how the death benefits interrelate with the balance of their estate. Many of these decisions are irrevocable or at the very least are difficult and expensive to change.

If a participant who wishes to designate a beneficiary other than a legal spouse or dependent child, and he or she is prevented from doing so, and then dies prior to final adjudication of the pending declaratory ruling, that participant can never change the beneficiary and is without recourse. If a beneficiary is not named, it is impossible to determine, after the participant dies, who might have been named as beneficiary.

Likewise, if a participant is planning his or her estate, that participant may very well make different allocations within the estate depending on the amount of the death benefits payable to the beneficiary.

The unvarnished truth is that participants die every day, and it is impossible to predict when. The ability to designate a beneficiary and to plan an estate with certainty is essential to participants and cannot be changed after the fact.

Even assuming that Petitioners could meet the injunction standards for the specific provisions listed in section III.A. above, the Court should exercise discretionary power in the granting or withholding of its injunctive powers. AThe relief is not given as a matter of course for any and every act done or threatened to the person or property of another; its granting rests in the sound discretion of the court to be exercised in accordance with well-settled equitable principles and in the light of all facts and circumstances in the case. . .@ McKinnon v. Benedict, 38 Wis. 2d 607, 616,

157 N.W.2d 665 (1968) (citing 28 Am. Jur., Injunctions, sec. 35, pp. 528-29).

Furthermore, an injunction Ashould not be granted where the inconveniences and hardships caused outweigh the benefits.@ Maitland v. Twin City Aviation Corp., 254 Wis. 541, 549, 37 N.W.2d 74 (1949). In this case there is no benefit to enjoining the several provisions detailed above but there is real inconvenience and hardship to participants.

CONCLUSION

The Court should temporarily restrain the DETF from implementing AB495 until certain procedural and jurisdictional issues are resolved. At an appropriate time, however, the parties should be required to show good cause to enjoin each provision of AB495 for any length of time.

Dated this 28th day of December, 1999.

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